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NO.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

JACOB FRIEDLAND,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Questions Presented for Review[1]

A.1. Whether a person who takes no action, makes no decision, has no duty, and possesses no *de facto* control or influence with respect to the investment or distribution of pension fund assets can, consistent with the statutory language, congressional intent, and due process notice requirements, be held to violate 18 U.S.C. §1954?

Whether the construction of 18 U.S.C. §1954 by the Court of Appeals impermissibly eliminates an essential element of the statute, thereby impermissibly lessening the prosecution's burden of proof; and if not, whether that court's construction of 18 U.S.C. §1954 approves the retroactive application of a new and expansive interpretation of a criminal statute in violation of the Due Process Clause of the Fifth Amendment?

A.2. Whether apparent or ostensible power to influence the investment of pension fund assets, based upon a false claim of such capacity, is a sufficient basis for conviction under 18 U.S.C. §1954, where neither actual capacity to influence nor an intent to exercise such influence has been shown to exist?

B. Whether the preliminary proof requirements established below for an evidentiary hearing on the Government's loss or destruction of relevant, discoverable evidence are so unreasonably stringent as to wholly undermine and virtually eliminate the due process duty of the Government to preserve such evidence?

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[1] *Parties.* Petitioner's son, David Friedland, a co-defendant at trial, was also a party as a co-appellant in the consolidated appeals before the United States Court of Appeals for the Third Circuit below. David Friedland is filing a separate Petition for Writ of Certiorari.

C. Whether, in reviewing the inadvertent and erroneous submission to the jury of prejudicial material not in evidence, the harmless error standard of *Chapman* v. *California*, 386 U.S. 18 (1967) should be applied, rather than the plain error standard applied by the Court of Appeals in disregard of its own prior binding precedent, and in disregard of decisions in other Circuits?

D. Whether, in a prosecution for obstruction of justice by solicitation of false testimony from a Grand Jury witness in violation of 18 U.S.C. §1503, the Fifth and Sixth Amendments require that the indictment specify the subject matter of the testimony and the false statements allegedly solicited?

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The petitioner Jacob Friedland respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit which affirmed the judgment of conviction of petitioner entered in the District Court in this case.

Opinions Below

The opinion of the Court of Appeals for the Third Circuit is reported at 660 F.2d 919. It is reproduced in Appendix A (1a-27a) to this Petition. The opinion of the District Court pertaining to question B. presented by this Petition has not been officially reported, but is reproduced in Appendix D (32a-45a).

Jurisdiction

The opinion of the Court of Appeals for the Third Circuit was filed and judgment was entered on October 1, 1981 (App. B, *infra,* 28a-29a). On October 13, 1981, the Court of Appeals granted petitioner's motion for enlargement of time to file a petition for a rehearing and suggestion for a rehearing in banc. On November 10, 1981, the Court of Appeals denied the petition for a rehearing (App. C, *infra,* 30a-31a). On January 7, 1982, Mr. Justice Brennan extended the time for filing a Petition for a Writ of Certiorari to and including February 8, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Constitutional and Statutory Provisions Involved

1. The Fifth Amendment to the United States Constitution provides in relevant part:

> No person shall . . . be deprived of life, liberty, or property, without due process of law.

2. 18 U.S.C. §1954 provides in relevant part:

> Whoever being—
>
> (1) an administrator, officer, trustee, custodian, counsel, agent, or employee of any employee welfare benefit plan or employee pension benefit plan; or
>
> (2) an officer, counsel, agent, or employee of an employer or an employer any of whose employees are covered by such plan; or
>
> (3) an officer, counsel, agent, or employee of an employee organization any of whose members are covered by such plan; or

> (4) a person who, or an officer, counsel, agent, or employee of an organization which, provides benefit plan services to such plan
>
> receives or agrees to receive or solicit any fee, kickback, commission, gift, loan, money, or thing of value because of or with intent to be influenced with respect to, any of his actions, decisions, or other duties relating to any question or matter concerning such plan . . . shall be fined not more than $10,000 or imprisoned not more than three years, or both. . . .

3. 18 U.S.C. §1503 provides in relevant part:

> Whoever . . . corruptly . . . influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

Statement of the Case

Petitioner Jacob Friedland, now 82 years old, was indicted along with his son, David Friedland, and charged with one count of conspiracy to solicit and receive kickbacks, in violation of 18 U.S.C. §1954 and 18 U.S.C. §371; two counts of soliciting and receiving kickbacks, 18 U.S.C. §1954; one count of traveling and causing to travel with intent to promote and facilitate bribery, 18 U.S.C. §1952; two counts of filing false income tax statements, one relating to the year of alleged receipt of the kickbacks, 26 U.S.C. §7206(1);[2] and one count of endeavoring to obstruct justice, 18 U.S.C. §1503. At all times relevant to

[2] The other count alleged a failure to report interest on a foreign bank account.

the indictment petitioner and his son were general counsel to the Mid-Jersey Trucking Industry Local 701 Pension Fund (hereinafter "the Fund").

The gist of the charges centered around two alleged violations of the offense created by 18 U.S.C. §1954. It was alleged that petitioner and his son had solicited and received two kickbacks from one Barry Marlin in exchange for two loans by the Fund to two corporations controlled by Marlin. One violation consisted of the alleged receipt of a $315,000 payment during April 1975 in Freeport, Bahamas, in exchange for a $3.5 million loan, and the other consisted of an alleged payment of $45,000 in December, 1975 in exchange for a $500,000 loan.

Following a jury trial, petitioner was convicted on all counts.[3] He was sentenced to an aggregate term of two years and a fine of $35,000.

Marlin was the Government's chief witness at trial. The trial court characterized Marlin as, among other things, a "gargantuan thief", who was an unsavory character and was unworthy of belief (App. A, *infra*, 26a-27a). Further, according to the trial court, conviction on all charges except the obstruction of justice count was dependent upon a belief in Marlin's uncorroborated testimony on essential elements of each of the offenses charged (6/5/80, Tr. 65-66, 71).[4] The dependence of the verdict upon this questionable evidentiary basis was noted by Circuit Judge Adams, in his concurring opinion, to be one of "sev-

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[3] The jurisdiction of the District Court was premised on 18 U.S.C. §3231.

[4] Transcript of the motion for a new trial held on June 5, 1980. When not preceded by a date, "Tr." will refer to the transcript of the trial proceedings, which have been consecutively numbered.

eral troubling aspects" presented by the case (App. A, *infra,* 27a). Judge Adams noted that this might properly have been a basis for a District Court decision granting petitioner's motion for a new trial. (*Id.*).

A. Construction of 18 U.S.C. §1954.

Each of the counts alleging a violation of 18 U.S.C. §1954 charged that petitioner and his son solicited and received the specified payments from Barry Marlin "because of and with intent to be influenced with respect to their actions, decisions and duties relating to questions and matters concerning the investment of the assets of the Pension Fund, to wit, . . ." the granting of each of the loans by the Pension Fund to Marlin's corporations. Prior to trial petitioner moved unsuccessfully for dismissal of these counts on the ground that each failed to charge an essential element of the offense by failing to allege any duty, decision, or action by petitioner as the basis for the payment of the kickbacks.

If believed, the evidence during the Government's case at trial established following. Petitioner and his son were general counsel for the Fund during the period in question. They represented to Barry Marlin that for a fee they could arrange the loans in question. The two payments in question were paid by Marlin and received by petitioner and his son. Both of the loans were subsequently approved by the Fund's independent investment manager, and the proceeds of the loans were issued to Marlin's companies.

The evidence at trial also established the following. The duties of petitioner's law firm to the Fund were specifically restricted to attending Fund meetings, taking and preparing minutes of those meetings, and rendering such

legal advice as the trustees of the Fund might request. Not only did petitioner and his son have no duties with regard to investment and distribution of fund assets, but the trustees themselves had delegated the duties and responsibilities for investment of the Fund's assets to an independent investment management firm.

At the time in question, management of the Fund's assets had been delegated to the Unicorn Group, which had total and absolute discretion in the investment of those assets pursuant to the delegation (Tr. 2553).[5] Neither petitioner nor his son had any duties or functions with regard to the investment of assets of the Fund (Tr. 2556; Tr. 2621-2622). As the investment manager, Unicorn had its own counsel, which had responsibility for all legal advice concerning investment of fund assets, including the loans charged in the indictment (Tr. 2582).

The uncontradicted testimony of Stone Douglass, a principal in the Unicorn Group at the time in question, was that neither petitioner nor his son, nor anyone else connected with the Fund, influenced or attempted to influence any member of the Unicorn Group in granting the two loans in question (Tr. 2580-2581). Douglass further testified that the loan in question was a good investment for the Fund at the time in question, and was granted solely on the basis of the minimal risk involved and the substantial return to the Fund (Tr. 2571; Tr. 2656-2657).

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[5] The only power retained by the trustees with respect to investments of fund assets was the limited power to direct the investment manager in writing to invest the assets of the fund in a particular investment or investments, and in that case to hold harmless the investment manager from all liability. This power was never exercised during the period in question.

There was no evidence at trial that petitioner or his son took any action or made any decision or exercised any influence over the granting of the particular loans in question, and in return for the alleged kickback. Nor was there any evidence that petitioner or his son had any legal duties or powers with respect to the investment or distribution of pension fund assets. Nor was there any evidence at trial that petitioner or his son had even a demonstrated capacity to control or influence, directly or indirectly, the investment or distribution of fund assets, including the loans in question.[6]

Among the jury charges requested by defense counsel was an instruction that a necessary element of the offense was a finding that petitioner either took some action, made some decision, or had some other duty with respect to the loans made by the pension fund. Counsel contended that mere receipt of the payments, and the fact of petitioner's position as counsel, were insufficient. It was contended

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[6] During the conference held pursuant to *Fed. R. Crim. P.* 30, regarding the prospective charge to the jury, the trial court stated:

> Now I'll state rather clearly what I think is the case.
>
> There is no evidence in my judgment that would permit the inference that the Friedlands, either one of them, brought to bear any influence on the trustees or on the members of the Unicorn Group to bring about the granting of this loan. (4/7/80, Tr. 14-15).

During argument on the motion for a new trial, the trial judge observed, even more clearly:

> I don't know what's coming in these cases when the indictment is brought. The indictment would lead you to believe that the Friedlands did, in fact, have some duty vis-a-vis their position as counsel to the fund with respect to loans, and that they did something to facilitate the granting of this loan. It turns out not to be so (6/5/80, Tr. 48).

that the statute required, as a necessary element of proof, that the actor be shown to have at least the duty, power or capacity to effectuate whatever the objective was of the kickback or payment. Counsel further specifically requested, as to the "because of" prong of the statute, that the court instruct the jury that for conviction under that prong, the actor must be proven to have done something, made some decision, or exercised some duty, in return for which the payment was being made. These requests to charge were denied.[7] These same arguments concerning the

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[7] The trial court charged the jury that it could convict for a violation of §1954 if it found that petitioner had received the kickback from Marlin either "because of" or "with intent to be influenced with respect to", any of petitioner's "actions, decisions, or other duties relating to any question or matter concerning" the fund, that is, either of the loans to Marlin's corporations. (4/9/80, Tr.25-26). With regard to the "with intent to be influenced" prong of the statute, the court charged:

> In order to find that the money was received by the defendants with intent to influence their actions, the evidence need not establish that the defendants had the actual formal legal power to effect or secure the placing of the loan to either Dunhill Brown Corporation or Dunhill Brown Shippers. It is sufficient that the defendants received the money with intent to influence any action concerning the loans made by the pension fund, regardless of whether or not that action was the exercise of formal legal power or the exercise of influence.

With regard to the "because of" prong of the statute, the court charged:

> Furthermore, you need not find that defendants actually influenced the granting of the loans to find they received a cash payment because of his actions, decisions, and duties relating to the loans, so long as such influence was the stated purpose in receiving the cash payments.

(4/9/80, Tr. 26-27).

defects in the charge on 18 U.S.C. §1954 were raised by counsel for petitioner on the motion for a new trial (6/5/80, Tr. 28-57; Tr. 207-210).

In the Court of Appeals, petitioner contended that his conviction under §1954 must be reversed because the Government failed to prove, and the trial court failed to charge the jury with respect to, an essential element of the offense: an act, a decision, or a duty concerning, or minimally a demonstrated capacity or ability to actually influence, the investment or distribution of fund assets. This argument was premised upon the statutory language requiring that the thing of value solicited or received by the actor be related to (because of or with intent to be influenced with respect to) "any of his actions, decisions or other duties" concerning the plan. The court rejected this contention, and held that such capacity was automatically established by petitioner's status as counsel to the Fund, one of the four predicate classes specified in the statute:

> Appellants' status as counsel to the fund is sufficient to place them in the class of those persons capable of violating either prong of §1954 simply by soliciting or accepting payment (a) by virtue of their status as counsel, under the "because of" prong, or (b) with an improper purpose, under the "intent" prong. Therefore, the failure to instruct the jury to make a specific finding of "capacity" was not error. (App. A, *infra*, 12a-13a).[8]

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[8] Petitioner also contended that the convictions under §1954 must be reversed because the trial court erroneously instructed the jury that, under the "because of" prong of the statute, an action, decision or fulfillment of a duty need not have been proven, and

(Footnote continued on following page)

B. Denial of an evidentiary hearing on the loss or destruction by the Government of relevant evidence.

Prior to trial, petitioner moved for dismissal of the indictment on the ground that the Government negligently lost, destroyed, or allowed the loss or destruction of, relevant discoverable evidence. Petitioner moved alternatively for an evidentiary hearing on the issue. The lost or destroyed evidence which was the subject of petitioner's motion consisted of two types: one was the personal financial and business records of Barry Marlin, and the other consisted of records of the First Kensington Bank of the Cayman Islands, which had been obtained by the Government.

In support of the motion with respect to the first category of evidence, petitioner's proffer concerning the existence and the loss or destruction of the evidence consisted of both direct and circumstantial proof. The circumstantial indications included the existence of empty file folders with labels as to the previous contents, substantial gaps in consecutively and numerically ordered files and documents, and the strangely coincidental absence of documents, notes and memoranda regarding subjects at the heart of the prosecution of petitioner from the files of one with a virtual mania for keeping records (1/28/80, Tr. 42-45). Among the direct evidence proffered was the statement by a secretary employed by Barry Marlin's brother during the time in question, that certain records she had created,

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(Footnote continued from preceding page)

that it was sufficient for conviction under *this* prong, if the exercise of influence was the stated purpose in receiving the cash payments. The court rejected petitioner's contention. It again relied on petitioner's status as counsel to the fund, and held it sufficient for conviction under this part of the statute that payment was received because of that status, and the ostensible power to exercise influence which it implied. (App. A, *infra*, 13a-15a).

and which were relevant to the instant prosecution, had been given to a Government agent, and reviewed with her, and that such documents were now nowhere to be found. Other direct evidence included Marlin's statements to close associates that his records had been "sanitized". There was also the sworn declaration of one Doreen B. Wolf, a legal worker charged with taking inventory of the Marlin records in connection with pending bankruptcy proceedings, to the effect that she had witnessed Marlin's secretary remove a bag full of documents from the record room and subsequently return the bag thereto (Certification of counsel submitted in support of motion; App. D, *infra*, 37a, 38a & n.6, 39a).

As to the first category of missing evidence, petitioner contended that the records and documents would have had a direct bearing on Marlin's credibility, and would have been relevant, substantive evidence regarding the charges at trial (1/28/80, Tr. 39-44). The records and documents would have traced the loan money at issue in this case, and even more importantly, the money allegedly paid as kickbacks could have been shown never to have really diminished Marlin's assets, but instead, to have remained in his account (1/20/80, Tr. 42-43).

The second category of evidence which was the subject of petitioner's motion primarily concerned the records of the First Kensington Bank of the Cayman Islands. As part of an investigation of Barry Marlin which led to his federal prosecution in California in 1977, postal inspector Herman Almond had obtained all of the records of the First Kensington Bank, pertinent to the transactions in issue in the petitioner's case, from the liquidator of the First Kensington Bank (Tr. 2315, 2319). Petitioner had attempted to obtain the same records from the appropriate parties in the Cayman Islands, but had been unable to do

so because of the bank secrecy laws obtaining therein (Tr. 2308).

Neither the existence nor the destruction of these records by the Government while in its custody and control was ever really in dispute. In the course of proceedings on the motion, the Government conceded that the bank documents at issue had been destroyed, allegedly routinely, by postal inspector Almond shortly after Marlin's sentencing upon his pleas of guilty in April, 1978. Contrary to an indication in the trial court's opinion (App. D, *infra*, 42a & n.11), copies of bank records in possession of the special counsel to the Local 701 Pension Fund, of which petitioner was informed by the Government, did not constitute all or even most of the bank records which had been destroyed by postal inspector Almond.

As part of the pretrial proffer concerning the relevance of the Cayman bank records, petitioner stated that the documents could demonstrate how Marlin had misappropriated most, if not all of the $3.5 million loan to his corporation from the Fund. Petitioner also asserted that the records could demonstrate that the alleged kickbacks from petitioner and his son were in fact recorded as still part of Marlin's accounts in the First Kensington Bank. This proffer concerning relevancy and materiality was confirmed during the course of trial. According to one of the Government's witnesses, the bank records could have a direct, exculpatory bearing on two of the tax counts at issue at trial (Tr. 2322-2323, 2331).

In a written opinion of March 25, 1980, the trial court denied the motion, refusing not only to dismiss the indictment, but also refusing to grant petitioner's request for an evidentiary hearing on the issues involved (App. D, *infra*, 32a-45a). The trial court held that petitioner had failed to establish a sufficient factual basis regarding

either the prior existence of the evidence at issue, or its relevance to the case, to warrant the evidentiary hearing requested. (*Id.*). As to the second category of evidence, the Cayman Bank records, the existence and destruction of which had been conceded by the Government, the court simply relied upon the Government's unsworn and unsupported assertion, disputed by defense counsel, that duplicates of these records existed and were in possession of special counsel to the pension fund, and were immediately available to the defense (App. D, *infra*, 42a at n.11).

The Court of Appeals held that the denial of an evidentiary hearing was not error, because petitioner "failed to make any showing that the evidence sought ever existed or was relevant to the instant proceeding." (App. A, *infra*, 15a-16a). In so holding, the Court failed to review the actual proffer which had been made by petitioner below. Moreover, although the court acknowledged that two categories of evidence were at issue, it failed entirely to review the denial of the hearing as it applied to the loss or destruction of the second category of evidence. Not a single mention is made of petitioner's showing below with respect to the records of the First Kensington Bank, and the fact that their existence and destruction by the Government were conceded.

Circuit Judge Adams, in his concurring opinion, referred to this issue as one of the "several troubling aspects" presented by the case. Although being unable to conclude that reversal was required, Judge Adams stated: ". . . there appears to be a serious question whether a hearing should have been conducted to determine if some of the documentary evidence had been tampered with in an impermissible manner." (App. A, *infra*, 27a).

C. Standard of review of jury's consideration of material not in evidence.

During trial, the Government sought to introduce evidence of excess expenditures by petitioner and his son to show that they spent more than their income during the two years which were the subject of the tax counts (Tr. 1850-1853; Tr. 1872. The trial court reserved ruling on the admissibility of such evidence until nearly the end of the Government's case. Prior to the court's ruling, the Government sought to authenticate records showing the credit card purchases of petitioner and his son through the custodian of records for the American Express Company (Tr. 1850). A determination concerning the admissibility of the records, however, was to await further briefing on the excess expenditure issue, and the court's ruling thereon (Tr. 1852).

The witness identified two of the documents, marked as Government exhibits 77A and 77C, as copies of his company's records of credit card transactions billed to the law firm of petitioner and his son during certain periods (Tr. 1857-1861). Each of these exhibits contained copies of several credit card receipts, with each receipt reflecting a separate transaction at a given time and in a given place.

At the conclusion of defense counsel's *voir dire* examination of the witness regarding authentication, counsel indicated that he had no objection to the documents, and the Court indicated that they should be marked into evidence. Following the *voir dire*, the prosecutor sought to question the witness regarding the identity of two particular charges contained on the exhibits, and defense counsel objected on the grounds of relevancy and the court's prior indication that the substance of the particular records would not be adduced until the court had

made a ruling on the excess expenditure issue (Tr. 1865-1872). Defense counsel indicated that he did not object to the two particular charge slips contained among the others on the exhibits, which established the presence of petitioner's son in Switzerland and the Bahamas on critical dates. He did object to testimony concerning any other charges, since their only relevance would be on the issue of excess expenditures, which the court had yet to decide (Tr. 1867-1869). During this colloquy, the trial court made clear that it had not admitted the exhibits fully into evidence, but had only admitted them for purposes of authenticity, and conditionally on its subsequent ruling on the excess expenditure evidence (Tr. 1874). The court also stated that the two particular charges, or relevant portions thereof, could be read or passed to the jury (Tr. 1565-1866).

On the following day, the trial court excluded, as more prejudicial than probative, evidence of excess expenditures (Tr. 2263-2295). Although no specific reference was made to G77A or G77C, the court's exclusionary ruling clearly applied to all but the two particular charges relevant to location. As noted by the trial court in ruling on the motion for a new trial, all except two of the charge receipts contained on the exhibits were not established to be relevant, and were arguably excluded by its subsequent ruling regarding the inadmissibility of excess expenditure evidence (6/5/80, Tr. 216-219).

Despite prior review by both counsel and the court of all exhibits, the two exhibits in question were inadvertently sent to the jury without a redaction of what should have been the excluded portions thereof. As conceded by the trial court, "It was a mistake." (6/5/80, Tr. 110).

Petitioner proffered as one ground of his motion for a new trial that the jury's verdict was tainted by the presence in the jury room of those portions of the two exhibits which had not been properly admitted into evidence. The trial court denied the motion on the ground that petitioner had not been prejudiced thereby, because the charges not in evidence were not large enough to prejudice the jury's consideration of the evidence.

In reviewing this issue, the Court of Appeals applied the "plain error" standard, stating: "If the exhibits were not intended by the court or the parties to remain in evidence, or were not actually admitted into evidence, appellants cannot now object to their presence in the jury room unless they can show that the court committed 'plain error.' Fed. R. Crim. P. 52(b)." (App. A, *infra*, 18a). The Court concluded that the trial court had not committed "plain error" in finding that the presence of the exhibits in the jury room did not prejudice the appellants (App. A, *infra*, 19a).

D. Sufficiency of the obstruction of justice (18 U.S.C. §1503) count of the indictment.

Count V of the indictment charged petitioner with obstruction of justice by solicitation of false testimony from a Grand Jury witness in violation of 18 U.S.C. §1503. The count failed to specify either the subject matter of the testimony or the specific false statements solicited. Petitioner's pretrial and post-trial motions challenging the count as defective and insufficient were denied by the trial court (App. A, *infra*, 11a). The Court of Appeals affirmed, and held that Count V adequately charged the offense. (*Id.* at 21a-22a & n.10).

Reasons for Granting the Petition

A. Construction of 18 U.S.C. §1954.

The court's construction of 18 U.S.C. §1954 presents an important question of federal statutory law which has not been, but should be, settled by this Court. The Court of Appeals construed the statute in such a way as to conflict with decisions of this Court on fundamental due process requirements for criminal prosecutions and the construction of criminal statutes. The court's decision is also in conflict with decisions of this Court and decisions of other Courts of Appeals which construe analogous statutes.

18 U.S.C. §1954 was added as part of the 1962 amendments to the Welfare and Pension Plans Disclosure Act. Although prosecutions pursuant to this statute are by no means infrequent, no prior decision has considered the question here at issue. Perhaps that is because no prosecution pursuant to §1954 has ever been premised upon such a tenuous basis as the instant one.

Prior to the Third Circuit's recent decision in *United States* v. *Palmeri*, 630 F.2d 192 (3d Cir. 1980), *cert.* den., —— U.S. ——, 101 S.Ct. 1484 (1981), and its opinion in the instant matter, all prior constructions of §1954 involved the question of whether the actor fell within one of the four predicate classes defined in the statute.[9] *Palmeri* and this case are the only ones in which the meaning of the statutory language—"any of his actions, decisions, or other duties relating to any question or matter concern-

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[9] *See, e.g., United States* v. *Russo*, 442 F.2d 498 (2d Cir. 1971), *cert. den.*, 404 U.S. 1023 (1972); *United States* v. *Marroso*, 250 F.Supp. 27 (E.D. Mich. 1966).

ing such plan"—have been placed in issue. The instant case involves the first reported instance in which the statute has been applied to an actor who receives payment, and is within one of the four predicate classes, but who takes no action, makes no decision, has no duty, and has no proven, demonstrated capacity to influence, the alleged question or matter concerning the plan. In all prior applications of the statute, including *Palmeri,* the defendant was unquestionably proven either to have had a duty with respect to distribution of fund assets, or to have taken some action, whether authorized or unauthorized, or to have exercised *de facto* influence, with respect to the distribution of fund assets.[10]

According to the court's decision in the instant matter, neither an act, decision or established duty with respect to fund assets is necessary under the statute. Nor is it even necessary, as would have seemed clearly required by the decision in *Palmeri,* that the actor have an actual capacity or ability to influence decisions regarding fund assets. It is sufficient, according to the court's decision, that the actor have merely an apparent or ostensible power to influence, even if the evidence indicates that this capacity or power does not in fact exist. Moreover, this ostensible power is automatically established by proof that the actor falls within one of the four predicate classes specified in the statute.

As a result of this construction, the court has effectively excised the language of the statute requiring that the payment be solicited or received in relation to the defendant's "actions, decisions, or other duties" pertaining to

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[10] *See, e.g., United States* v. *Palmeri, supra; United States* v. *Russo, supra.* See also, *United States* v. *Dorfman,* 470 F.2d 246, 248-249 (2d Cir. 1972), *cert.* dismissed, 411 U.S. 923 (1973).

any matter concerning the plan. Clearly, had Congress intended that the four predicate classes would automatically establish this latter element, the noted language would have been unnecessary to include in the statute. In so construing the statute, the court has violated the rudimentary tenet of construction that a statute should not be construed to make it redundant of itself. *Colautti* v. *Franklin*, 439 U.S. 379, 392 (1979); *Jarecki* v. *G.E. Searle & Co.*, 367 U.S. 303, 307-308 (1961).

Even more fundamentally, the court's construction has the effect of eliminating a necessary and constituent element of proof which the statutory language indicates is required. The statute does not refer to ostensible or apparent "actions, decisions, or other duties", and nothing in the statute indicates that this language is to be read other than with its plain meaning, as requiring an actual and in-fact act, decision or other duty as the basis for receipt of the payment.

By approving the trial court's instructions to the jury, and by reading the statute so as to eliminate this element, the court has violated the most rudimentary requirements of due process. It is axiomatic that the Due Process Clause protects a defendant in a criminal case against conviction "except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. 358, 364 (1970); *Jackson* v. *Virginia*, 443 U.S. 307, 315 (1979). It is equally elemental that a conviction based upon a record wholly devoid of any relevant evidence of a crucial element of the offense charged is constitutionally infirm. *Thompson* v. *Louisville*, 362 U.S. 199 (1960).

In effectively eliminating the noted element from a §1954 offense, the decision below conflicts with the decisions of this Court and other Circuit Courts of Appeals

which have construed analogous statutes with not dissimilar structures to that of 18 U.S.C. §1954. For example, 18 U.S.C. §201(g) proscribes the receipt by a public official of anything of value for or because of "an official act performed or to be performed by him." In construing this statute, no court has ever held or intimated that any act taken by one falling within the definition of a public official constitutes an official act for purposes of conviction; rather, the courts have meticulously required that the act taken by one proven to be a public official be shown to be such as to fall within the statutory requirement and definition of an "official act". *See, e.g., United States* v. *Birdsall,* 233 U.S. 233 (1914) (construing the antecedents of §201); *United States* v. *Muntain,* 610 F.2d 964, 967-969 (D.C. Cir. 1979); *United States* v. *Carson,* 464 F.2d 424 (2d Cir. 1972); *United States* v. *Evans,* 572 F.2d 455 (5th Cir. 1978); *United States* v. *Arroyo,* 581 F.2d 649 (7th Cir. 1978); *United States* v. *Alessio,* 528 F.2d 1079 (9th Cir. 1976). See also *United States* v. *Porter,* 591 F. 2d 1048 (5th Cir. 1979) (construing 42 U.S.C. §1395 2nn (b)(1)).

Even if not deemed a separate element requiring proof beyond a reasonable doubt, a fair reading of the language which has been effectively excised would lead a reasonable person to believe that the statute would not be violated unless receipt of the payment was related to acts, duties or influence which in fact existed. By holding that no such requirement is contained in the statute, as would be indicated by its language, the Court of Appeals has applied a new, and unexpected expansive interpretation of the statute after the fact to affirm a criminal conviction. Such unforeseeable expansion by judicial construction of a statute to include a defendant's conduct after the fact violates fundamental notions of due process. See *Marks* v. *United States,* 430 U.S. 188 (1977); *Rabe* v.

Washington, 405 U.S. 313 (1972); *Bouie* v. *City of Columbia*, 378 U.S. 347 (1964).[11]

The instant Petition should be granted so that this Court can review and correct the highly questionable construction of 18 U.S.C. §1954 contained in the decision of the Court of Appeals below.

B. The preliminary showing required in order to obtain an evidentiary hearing on the loss or destruction by the Government of relevant evidence.

Despite the petitioner's substantial proffer regarding the prior existence, nature and relevance of evidence lost or destroyed by the Government, the Court of Appeals held that the denial of an evidentiary hearing on the issue was not error because the preliminary showing was insufficient to establish that the evidence sought ever existed or was relevant to the trial. In so ruling, the court decided an important question of constitutional dimension, regarding the prosecutor's due process duty to preserve

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[11] In *Bouie* the Court stated:

> There can be no doubt that a deprivation of the right of fair warning can result not only from vague statutory language but also from the unforeseeable and retroactive judicial expansion of narrow and precise statutory language. . . . [A]n unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely like an *ex post facto* law, such as Art. I, §10, of the Constitution forbids. . . . If a state legislature is barred by the Ex Post Facto Clause from passing such a law, it must follow that a state Supreme Court is barred by the Due Process Clause from achieving precisely the same result by judicial construction.

378 U.S. at 353-354.

evidence, which has not been but should be decided by this Court. Moreover, the standard applied by the court undermines the very purpose of the preservation requirement, and is contrary to the standard that has been established by practice in other Circuits.

It is now firmly established that due process imposes an obligation on the prosecution to disclose favorable evidence to the defense. *United States* v. *Agurs*, 427 U.S. 97 (1976); *Brady* v. *Maryland*, 373 U.S. 83 (1963). See also *Giglio* v. *United States*, 405 U.S. 150 (1972). As a necessary concomitant to this duty of disclosure, most Circuits have recognized a due process duty of the prosecution to preserve relevant evidence which might be favorable to the accused. *See, e.g., United States* v. *Bryant*, 142 U.S. App. D.C. 132, 439 F.2d 642 (D.C. Cir. 1971); *United States* v. *Arra*, 630 F.2d 836 (1st Cir. 1980); *United States* v. *Miranda*, 526 F.2d 1319 (2d Cir. 1975), *cert.* den. 429 U.S. 821 (1976); *Government of the Virgin Islands* v. *Testamark*, 570 F.2d 1162 (3d Cir. 1978); *Armstrong* v. *Collier*, 536 F.2d 72 (5th Cir. 1976); *United States* v. *Rose*, 590 F.2d 232 (7th Cir. 1978); *United States* v. *Harris*, 543 F.2d 1247 (9th Cir. 1976); *United States* v. *Higginbotham*, 539 F.2d 17 (9th Cir. 1976); *Taylor* v. *Lane*, 470 F.Supp. 883 (E.D. Tenn. 1978).

This Court has never squarely decided issues concerning the existence, nature or limitations of the prosecution's due process duty to preserve evidence. See *United States* v. *Augenblick*, 393 U.S. 348, 355-356 (1968) (in *dicta*, indicating approval for the proposition that where discoverable evidence is allegedly lost by the Government, the burden of producing that evidence or explaining why it could not do so is upon the prosecution). In light of its fundamental nature, and the widespread recognition of the due process duty of preservation, the importance

of the question presented cannot be doubted. The frequency with which issues involving the duty of preservation arise requires that this Court provide guidance on the mechanics and implementation of the duty. Such guidance would include resolution of the question presented herein—the quantum of preliminary showing regarding the prior existence and nature of allegedly lost or destroyed evidence which is required before a defendant is entitled to a hearing on the issue.

The standard applied by the Court of Appeals is also contrary to the standard that has been established by practice in other Circuits. *Compare, United States* v. *Butler,* 499 F.2d 1006 (D.C. Cir. 1974); *United States* v. *Lieberman,* 608 F.2d 899 (1st Cir. 1979), *cert.* den., 444 U.S. 1018 (1980). Review by this Court is also necessary to resolve this apparent but unacknowledged conflict between the Circuits on the issue.

C. Standard of review of jury's consideration of material not in evidence.

In reviewing petitioner's claim that prejudicial material, not admitted into evidence, inadvertently had been submitted to the jury and was present in the jury room during deliberations, the Court of Appeals applied the plain error standard of review. In so ruling, the court's decision is in conflict with decisions in most other Circuits as to the appropriate reviewing standard in this situation. The decision below is also inconsistent with the federal harmless error rule for review of constitutional errors established by this Court in *Chapman* v. *California,* 386 U.S. 18 (1967). In addition to the necessity to resolve these conflicts, review by this Court is warranted because the appropriate standard of review ap-

plicable in this frequently occurring situation is an important question of federal law which should be settled by the Court.

Where prejudicial material not in evidence reaches the jury, whether through the inadvertence of counsel, or the court and its representatives, it is generally settled that a new trial is required if there exists a possibility that the material influenced the verdict. The test has been variously phrased. The Second, Tenth and District of Columbia Circuits adhere to the view that if there is the "slightest possibility" that harm could result, then reversal is required. *United States* v. *Marks*, 485 F.2d 1179, 1184 (10th Cir. 1973), *cert.* den., 416 U.S. 986 (1974); *Dallago* v. *United States*, 138 U.S. App. D.C. 276, 290, 427 F.2d 546, 560 (D.C. Cir. 1969); *United States* v. *Adams*, 385 F.2d 548, 550-551 (2d Cir. 1967). *But see United States* v. *Camporeale*, 515 F.2d 184, 188 (2d Cir. 1975). The Seventh and Eighth Circuits have stated that it is sufficient to require reversal if the error "might have operated to the substantial injury of the defendant." *Osborne* v. *United States*, 351 F.2d 111, 119 (8th Cir. 1965); *United States* v. *Grady*, 185 F.2d 273, 275 (7th Cir. 1950). The Fifth and Ninth Circuits have established that if there is a "reasonable possibility" that the error affected or prejudiced the verdict, then reversal is required. *United States* v. *Howard*, 605 F.2d 865, 866 (5th Cir. 1975); *United States* v. *Vasquez*, 597 F.2d 192, 193 (9th Cir. 1979).

Until the instant case, the Third Circuit applied a standard which required reversal if the material not in evidence "might have been influential" in the jury's determination. *United States* v. *Brandenburg*, 155 F.2d 110, 113 (3d Cir. 1946). *Brandenburg* involved a situation strikingly similar to the instant one where, through inadvertence of both counsel and the court, exhibits containing matter not

in evidence were submitted to the jury. Although it was relied upon by petitioner, the *Brandenburg* case was not even mentioned by the court below.

Each on these standards, although variously stated, turns of the existence of a mere possibility of influence of the material on the verdict. Such a standard is required because the actual impact upon the jury of such evidence cannot be accurately measured or ascertained. *United States* v. *Vasquez, supra,* 597 F.2d at 193. Moreover, each of the standards is effectively equivalent to the harmless error rule established by this Court for review of constitutional errors in *Chapman* v. *California, supra.* See 386 U.S. at 24.

When material not in evidence reaches the jury, fundamental rights of the accused, including the rights to trial by an impartial jury, to confrontation, and to cross-examination of adverse witnesses, are implicated. *Parker* v. *Gladden,* 385 U.S. 363, 364-365 (1966); *Turner* v. *Louisiana,* 379 U.S. 466, 472-473 (1965); *Virgin Islands* v. *Gereau,* 523 F.2d 140, 150-151 (3d Cir. 1975), *cert.* den., 424 U.S. 917 (1976). Therefore, application of the *Chapman* standard, or one of the other standards as articulated in the various decisions of the Circuits, is particularly appropriate for review of this kind of error to determine whether reversal is warranted.

The "plain error" rule contained in *Fed. R. Crim. P.* 52(b) is ambiguous as to whether it specifies a standard of prejudice which must be met before an unobjected to claim of error will be reviewed at all, or whether it specifies a heightened degree of prejudice which is required before an unobjected to error will be deemed to require reversal. *See* 8B *Moore's Federal Practice—Criminal Rules,* §52.02[2]; *United States* v. *Lopez,* 575 F.2d 681 (9th Cir. 1978). From a reading of the opinion below, it is

unclear in which of these ways the Court of Appeals applied the plain error rule (App. A, *infra,* 17a-19a). It is, however, clear that the court applied a more stringent standard of review either than that applied in the other Circuits in the above-noted cases, or than that pronounced in *Chapman* v. *United States, supra.*

D. Sufficiency of the obstruction of justice (18 U.S.C. §1503) count of the indictment.

Review should be granted because the ruling of the Court of Appeals in upholding the sufficiency of the obstruction of justice count (App. A, *infra,* 21a-22a & n. 10), conflicts with the decisions of this Court which establish requirements for the constitutional sufficiency of indictments. See *Russell* v. *United States,* 369 U.S. 749, 763-764, 768 & n.15, 770-771 (1962). See also, *Hamling* v. *United States,* 418 U.S. 87, 117-118 (1974).

Conclusion

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

FRANKLIN M. SACHS,
Attorney for Petitioner.[12]

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[12]Application for admission to the Bar of this Court has been filed and is pending.